

UNITED STATES OF AMERICA

v.

**KHALID SHEIKH MOHAMMED;
WALID MUHAMMED SALIH
MUBARAK BIN 'ATTASH; RAMZI
BIN AL SHIBH; ALI ABDUL AZIZ
ALI; MUSTAFA AL HAWSAWI**

Defense Motion

Requesting the Military Commission Order
a New Inquiry Into the Mental Health of
Mr. Mustafa al Hawsawi

25 June 2009

- 1. Timeliness:** This motion for appropriate relief is filed in a timely manner in accordance with the Military Commission ruling dated 11 June 2009.
- 2. Relief Requested:** Counsel respectfully request the Military Commission order a new inquiry into the mental health of Mr. al Hawsawi pursuant to Rules for Military Commission (RMC) 706.
- 3. Overview:** The Board convened on 15 December 2008 was not conducted in accordance with RMC 706 or the 9 December 2008 Commission order. As such, its findings are insufficient and a new board that complies with RMC 706 is required. Principles of fundamental fairness require a new examination.
- 4. Burdens of Proof and Persuasion:** As the moving party, the defense bears the burden. RMC 905(c)
- 5. Facts:**
 - a. On 15 April 2008, charges were sworn against Mr. al Hawsawi. Those charges were referred to a capital Military Commission on 9 May 2008.
 - b. On 24 November 2008, counsel for Mr. al Hawsawi filed an *ex parte* request for an inquiry into the mental health of Mr. al Hawsawi in accordance with RMC 706. In that request, counsel recounted an attorney-client meeting where a good faith basis to request a mental health examination arose.
 - c. On 8 December 2008, the Military Commission found unusual circumstances existed to warrant the *ex parte* request and granted the defense request for an examination. The inquiry was ordered on 9 December 2008 (Attachment A).
 - d. On 15 December 2008, a clinical psychologist and a forensic psychiatrist met with Mr. al Hawsawi. Counsel for Mr. al Hawsawi was not provided advance notice of the examination and the defense interpreter was not present.
 - e. On 19 December 2008, the final report was drafted and was shortly thereafter provided to the defense.

6. Law and Argument

THE INQUIRY INTO THE MENTAL CAPACITY OF MR. AL HAWSAWI WAS NOT CONDUCTED IN ACCORDANCE WITH RMC 706

An inquiry into the mental health of an accused is controlled by RMC 706. The order establishing the examination must establish the reason for conducting the examination and “**shall** require the board to make separate and distinct findings as to **each of the following** questions:

- (A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? [parenthetical omitted]
 - (B) What is the clinical psychiatric diagnosis?
 - (C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?
 - (D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense?”
- RMC 706(c)(2) (emphasis added)

While a military judge may have discretion whether to order a mental health inquiry (“After referral of charges, an inquiry...may be ordered...” RMC 706(b)(2)), once ordered, the Rules for Military Commission clearly outline the scope of the examination.

RMC 706 is identical in scope to Rules for Courts-Martial (RCM) 706. The language in RCM 706(c) outlines the same four questions as RMC 706(c). Military case law is clear that an inquiry (also called a sanity board) must follow the procedures outlined in RCM 706: “[t]he sanity board **must** address not only the accused’s capacity to stand trial, but also his mental responsibility at the time of the act in question.” *United States v. Mackie*, 66 M.J. 198, 202 (C.A.A.F. 2008), citing *United States v. English*, 47 M.J. 215, 219 (C.A.A.F. 1997) (emphasis added). Military law recognizes that mental health examinations may be conducted prior to and separate from RCM 706 evaluations. However, for those examinations to serve as “a substitute for the carefully crafted procedures set forth in the Manual,” the rule itself must be followed. *Id.* The “plain text” of the rule “outlines specific substantive findings that a sanity board is **required to make.**” *Id.* (emphasis added), see also *United States v. McGuire*, 63 M.J. 678, 681 (A.C.C.A. 2006) (restating the four questions from RCM 706 that the “board is required to answer.”)

On 9 December 2008, the Military Commission ordered an examination into the capacity of Mr. al Hawsawi “in accordance with Rule for Military Commission 706.” (Attachment A). The order stated: “The Board in its evaluation shall make separate and distinct findings as to each of the following questions:

(A) Is the accused presently suffering from a mental disease or defect? If so, what is the clinical psychiatric diagnosis?

(B) Does the accused have the present ability to consult with his lawyers with a reasonable degree of cognitive understanding and does he have a rational as well as a factual understanding of the proceedings against him? If so, does the accused have sufficient mental capacity to understand the nature of the proceedings against him (trial by commission) and to conduct or cooperate intelligently in the defense?" (Attachment A)

There is no reference in the order to either the required question in RMC 706(c)(2)(A)¹ or 706(c)(2)(C).² The rule requires the Military Commission to order an inquiry into all four questions outlined in RMC 706(c). Thus, on its face, the 9 December 2008 order did not comply with the requirements of RMC 706 and as such the examination conducted by the Board on 15 December 2008 was legally insufficient. RMC 706 requires a new board to answer the remaining two questions.

**THE INQUIRY INTO THE MENTAL CAPACITY OF MR. AL
HAWSAWI WAS NOT CONDUCTED IN ACCORDANCE WITH
THE COMMISSIONS ORDER DATED 9 DECEMBER 2008**

In further error, the 9 December 2008 order provides that the "defense may choose to have its assigned interpreter present when the accused is examined." (Attachment A) Counsel were not contacted regarding the date or time of the examination and thus were not provided the opportunity to have an interpreter present. Counsel first learned the examination had been conducted through an unrelated communication with a member of the JTF-GTMO Staff Judge Advocate's office. Counsel would have insisted on the presence of the defense interpreter had adequate notice been provided. Because the defense interpreter was not present, a new board must be convened in order to ensure that the interpreter can be present for the entire examination into the four RMC 706-required questions.

FUNDAMENTAL FAIRNESS REQUIRES A NEW INQUIRY

An individual may not be tried in a criminal case unless he is competent. *See Pate v. Robinson*, 383 U.S. 375, 378 (1966). Now that the issue of Mr. al Hawsawi's competency has been raised, due process requires that the Military Commission proceed accurately in the evaluation of Mr. al Hawsawi's competence. *Id.* at 385. Failure to do so, violates Mr. al Hawsawi's right to a fair trial. *Id.* *See generally* U.S. CONST. amend, V (protecting due process rights) and RMC 102 and MCRE 102 (providing for the "just determination of every proceeding" and "fairness in administration.")

As Mr. al Hawsawi's case has been referred capital, the Military Commission is

¹ "At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? [parenthetical omitted]"

² "Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?"

charged with ensuring “a greater degree of accuracy and fact finding than would be true in a non-capital case.” *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993). The United States Supreme Court has determined “the penalty of death is qualitatively different from a sentence of imprisonment, however long,” and “there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.” *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

The concern for heightened reliability in capital case procedures is a principle of fundamental due process. In capital cases, doubtful factual and legal issues that might be decided in favor of the government in a non-capital case must instead be decided for the defendant “*in favorem vitae* [in favor of life].” *United States v. Smith*, 27 F.Cas. 1167, 1168, 1169 (2 Mason 143) (C.C. D.Mass. 1820) (Story, J., in circuit) (“If the present were a capital case, it would be our duty to adhere to the very letter of established doctrines *in favorem vitae*”).

Further, there is a special need for heightened due process in military capital trials because of the danger of unlawful influence created by the command structure:

So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial where the judge and trier of fact are not responsive to the command of the convening authority ... The distinction is by no means novel . . . nor is it negligible, being literally that between life and death. *Reid v. Covert*, 354 U.S. 1, 77 (1957).

Accord, id., 354 U.S. at 45-46 (Frankfurter, J., concurring) (“These cases involve the validity of procedural conditions for determining the commission of a crime in fact punishable by death. The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights.”).

Ultimately, however, “proceedings must not only be fair, they must appear fair to all who observe them.” *Indiana v. Edwards*, 128 S.Ct. 2379, 2387 (2008); quoting *Wheat v. United States*, 108 S.Ct. 1692 (1988). Failure to provide Mr. al Hawsawi with a mental health evaluation that properly conforms to RMC 706 violates his rights to a fair trial.

7. Oral Argument: The defense requests oral argument.

8. Request for Witnesses: Witnesses are not requested at this time. However, the nature of the possible defense reply could necessitate the addition of witnesses. If that is the case, counsel will provide a request at that time.

9. Certificate of Conference: The government opposes the requested relief.

10. Attachments

A. Order, Inquiry Into the Mental Capacity of the Accused, dated 9 December 2008

Respectfully submitted,

By: *Jon S. Jackson*
MAJ JON JACKSON, JAGC, USAR
LT GRETCHEN SOSBEE, JAGC, USN
Detailed Defense Counsel for
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Office of the Chief Defense Counsel
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consisting of only the Board's ultimate conclusions as to all questions specified in paragraph 3. A request for a reasonable extension of time may be made to the Military Judge. This report will be prepared in three copies. The Military Commissions Trial Judiciary Staff, trial counsel and the defense counsel will be telephonically notified when this report is ready for pick-up. At the option of the officer responsible for the summarized report, it may be faxed or e-mailed to the Military Commissions Trial Judiciary Staff, trial counsel and the defense counsel.

b. Not later than then days after completion of the summarized report, the Board shall prepare its full report. This report shall be placed into a sealed envelope and provided to MAJ Jackson, JA, USAR and/or LT Sosbee, JAGC, USN only. The full report will NOT be faxed or e-mailed unless specifically requested by MAJ Jackson, JA, USAR and/or LT Sosbee, JAGC, USN.

6. Under no circumstances will the full report, matters considered by the Board during it's inquiry, or any statements made by the accused to the board (or evidence derived there from) be disclosed to anyone other than MAJ Jackson, JA, USAR and/or LT Sosbee, JAGC, USN, without express, written authorization from the military judge or the defense counsel.

7. Telephone numbers: Military Commissions Trial Judiciary Staff: [REDACTED]. Mr. Robert Swann, Prosecutor: [REDACTED], and MAJ Jon Jackson, JA, USAR or LT Gretchen Sosbee, JAGC, USN, Defense Counsel: [REDACTED]

Ordered this 9th day of December 2008:



Stephen R. Henley
Colonel, United States Army
Military Judge

Encl:

Charge Sheet

Ex parte Defense Request dtd 24 Nov 08 (to be provided by defense counsel)

Al Hawsawi medical and mental health records (to be provided by the government)

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ALI ABDUL AZIZ ALI;
MUSTAFA AHMED AL HAWSAWI**

**D-118
Government Response**

to the
Defense Motion Requesting the Military
Commission Order a New Inquiry Into the
Mental Health of Mustafa al Hawsawi
26 June 2009

1. **Timeliness:** This response is filed within the time allowable by the Military Commission Order P-010, dated 11 June 2009.
2. **Relief Sought:** The Government respectfully requests the Military Judge deny the Defense Motion for a New Sanity Board.
3. **Burden of Proof:** As the requesting/moving party, the accused bears the burden of persuasion. See Rule for Military Commissions (RMC) 905(c).
4. **Facts:**
 - a. On 9 October 2008, the accused informed his defense counsel that he wanted to represent himself (see ROT page 45 of the 8 December 2008 hearing.)
 - b. On 24 November 2008, defense counsel filed an ex parte request with the Commission recounting a meeting with their client that caused them to question his mental capacity to stand trial.
 - c. On 8 December 2008, this Commission ordered an inquiry “into the mental capacity” of the accused (see Order dated 9 December 08- Attachment A to Defense Motion). At the 8 December 2008 hearing, the Military Judge inquired as to how quickly arrangements could be made to have board members travel to Guantanamo Bay to conduct the board and complete their findings. Trial Counsel informed the Military Judge that he intended to have the board “on island ... within the next 10 days.” (see ROT page 149 of the 8 Dec 2008 hearing). Trial Counsel, Mr Swann, later approached Major Jackson outside the building to ask him if he wanted to be on island so that the defense could speak with the board before it interviewed the accused the following week. Major Jackson responded “no.”
 - d. On 15 December 2008, the board convened and met with the accused as part of its duties. While the accused speaks English, the board had an interpreter to assist them. On 19 December 2008, the board issued a report finding that the accused was not presently suffering from a mental disease or defect and that the accused had the present

ability to consult with his lawyers with a reasonable degree of cognitive understanding and has a rational as well as a factual understanding of the proceedings against him. The board concluded by finding that the accused has sufficient mental capacity to understand the nature of the proceedings against him (trial by commission) and to conduct or cooperate intelligently in his defense.

5. Discussion and Conclusion: The Defense contends that the Military Judge erred when he failed to direct the board to answer all four questions set forth in RMC 706 (c) (2) (A-D). The Government disagrees. Mental competency or capacity refers to the present ability of the accused to stand trial and to participate in and to understand the trial process. Mental responsibility refers to a person's mental condition at the time an offense was committed and criminal responsibility for that offense

The Military Judge's Order in this case is clear. The board was asked to provide its opinion whether the accused has the present mental capacity to stand trial. The questions the defense contends that were not asked relate directly to mental responsibility and not capacity. The defense had the opportunity to ask the Military Judge to expand the questions to include mental responsibility and chose not to do so. Their claim at this late date should fall on deaf ears.

The defense reliance on United States v. Mackie, 66 M.J. 198 (CAAF 2008) and United States v. McQuire, 63 M.J. 678 (ACCA 2006) is misplaced. Neither of these cases deals with the issue at hand. Mackie is concerned with whether the military judge in that case erred when he denied the defense motion for a sanity board finding that a Government stipulation of expected testimony from the accused's treating clinical psychologist answered the question whether Mackie was competent. McQuire dealt with whether the judge erred in accepting an accused's guilty plea.

Moreover the defense contention that the board's findings should be set aside because their interpreter was not present is equally without merit. Major Jackson was informed of the pending board. It was incumbent upon him to make arrangements for his interpreter to be present and not the Government.

Finally, if the Commission finds that it should have directed the sanity board to answer the questions that the defense is now concerned with, then the Government suggests that a new Order be prepared directing the same board to reconvene to answer the questions. A new board is unnecessary.

6. Request for Oral Argument: The Prosecution does not request oral argument but reserves the right to respond to any oral argument the defense may make.

7. Respectfully submitted,

Robert L. Swann
Prosecutor
Office of Military Commissions